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IN THE

Supreme Court of the United States

NO. 824

OCTOBER TERM, 1958

ADA J. VANT and WALTER J. VANT, Petitioners,

v.

THE MUTUAL BENEFIT LIFE INSURANCE COMPANY, a corporation, Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION AND APPENDIX

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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May 9, 1959

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v.

THE MUTUAL BENEFIT LIFE INSURANCE COMPANY, a corporation, Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

QUESTION PRESENTED

Whether an amended complaint was not properly stricken where it had been filed—without leave of court or consent of the defendant—after an unqualified affirmance by a court of appeals of a district court's dismissal of the action and where it contained only insufficient matter already considered by both courts.

RULES OF CIVIL PROCEDURE INVOLVED

RULE 12.

DEFENSES AND OBJECTIONS—WHEN AND HOW PRESENTED—BY PLEADING OR MOTION—MOTION FOR JUDGMENT ON PLEADINGS

* * *

"(f) **Motion to Strike.** Upon motion made by a party before responding to a pleading or, if no respon-

sive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."

RULE 15.

AMENDED AND SUPPLEMENTAL PLEADINGS

* * *

"(a) *Amendments.* A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . . ."

RULE 60.

RELIEF FROM JUDGMENT OR ORDER

* * *

"(b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrep-

resentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. . . ."

STATEMENT OF THE CASE

This litigation arises out of an effort by the beneficiaries of a policy of insurance upon the life of their deceased husband and father, to force immediate payment of the proceeds of a policy, which provided that only interest on the principal sum should be paid during the widow's lifetime and that the proceeds be paid to the son on her death. The payment provision of the policy was at the request of the insured, who stipulated that the right of withdrawal must be withheld from his wife during her lifetime (R. 2b). After the insured's death, the insurer issued a "certificate" wherein it formally undertook to make payments to the widow and the son in accordance with the terms of the policy. Sometime later, the widow and son, both living, contracted to "merge their interests" and demanded the proceeds immediately and outright. The insurer having refused to pay other than by the terms of the insurance agreement, the widow and son brought suit in the district court, basing jurisdiction on diversity of citizenship, seeking to compel a present lump sum payment of the insurance proceeds.

The defendant's motion to dismiss the complaint for failure to state a claim upon which relief could be

granted was granted in August 1957, and affirmed by the court of appeals in April 1958.

In the opinion which accompanied the judgment of the court of appeals, Judge Hastie discussed the quasi-trust theory under which some authorities have asserted that circumstances may exist which justify a departure from the method of disposition of the proceeds formulated by the deceased and incorporated in the insurance contract. He concluded such circumstances did not exist in the present case (App. 4-6). Plaintiff-petitioners erroneously assumed from this discussion that the court of appeals regarded the defendant-insurer as a formal trustee and in May 1958, served and filed an amended complaint in the district court (without leave of that court or consent of the defendant) by which they added to their claim the allegation that the defendant was a trustee.

Plaintiffs then asked the court of appeals for leave to make the amendment part of the record in the first appeal and on the basis thereof sought reconsideration of the affirmance of the judgment of dismissal. After full consideration, the court of appeals in June 1958, denied plaintiffs' motion for reconsideration. (App. 11)

In the meantime, the defendant had filed in the district court a motion to strike the amendment.[1] In October 1958, after the affirmance of the dismissal and the return of the mandate of the court of appeals, the dis-

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[1] The suggestion in the petition that the motion to strike is unauthorized or amounted to a waiver by defendant of its right to plead or otherwise defend (p. 3) disregards the provisions of Rule 12 of the Federal Rules of Civil Procedure.

trict court granted defendant's motion to strike. Plaintiffs filed notice of appeal. After the appeal was docketed, the defendant filed a motion to dismiss the appeal and to assess costs and attorneys' fees under the provisions of 28 U.S.C. 1912.

At the argument of defendant's motion, it was stipulated by the parties that the argument should be treated as on the merits of the appeal, as well as on the motions.[2] Thereafter, the court of appeals affirmed the action of the district court, although refusing defendant's application for an award of costs. In affirming the second time, the court of appeals specifically disclaimed that it had held that the defendant was a trustee and expressly held that neither the original complaint nor the amended complaint stated a claim on which relief could be granted.

Petitioners seek review by this Court of the judgment of the court of appeals affirming the striking of plaintiffs' amended complaint.

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[2] The statement in the petition (pp. 3, 11) that the submission as on the merits was conditioned in any way is a misstatement. (Minutes of Proceedings before Court of Appeals on December 15, 1958, Appendix, 9)

ARGUMENT

The underlying holding in this case is that the beneficiaries of an insurance policy cannot, at least by their mere agreement to do so, force an insurer to violate a compact with its policyholder as to the distribution of the proceeds of the policy. There is no decision of this Court dealing with this problem. The holdings of the Court of Appeals of the Third Circuit in this case, however, are the latest in a line of authorities unanimously supporting this proposition: Annotation, 145 ALR 1374, *Life Insurance Benefits As within Power of Courts to Hasten Enjoyment of Trust Funds; Re Nires*, 290 N. Y. 78, 48 N.E. 2d 268 (1943); *Pierowich v. Metropolitan Life Insurance Company*, 282 Mich. 118, 275 N. W. 789 (1937); *McLaughlin v. Equitable Life Assurance Society*, 112 N. J. Eq. 344, 164 Atl. 579 (1933); *Petition of Travers*, 177 Misc. 1044, 32 N.Y.S. 2d 742 (1941); *Elliott v. Travelers Insurance Co.*, 121 Ind. App. 400, 99 N.E. 2d 274 (1951).

The want of merit in plaintiffs' claim of itself supports the action of the lower courts. In *Barnet & Craig v. Muncie National Bank*, 98 U.S. 555 (1878), this Court stated:

> "An issue ought not to be tried where it would be a sheer mistrial and a mere waste of time. The court ought *sua sponte* to strike it out or disregard it."

Apart from the lack of merit in plaintiffs' claim, striking the amendment was proper because of the unorthodox manner in which plaintiffs chose to proceed in filing an amendment without leave of court or consent of the defendant, after the dismissal of the action

had been affirmed unconditionally by the court of appeals and after the very matters contained in the amendment had in effect been declared to be insufficient by the court of appeals.[3] This court has expressed its disapproval of the practice of filing additional pleadings without leave of court in an effort to reopen a case and to relitigate matters already decided by earlier appeals: *Stewart v. Salamon*, 97 U. S. 361 (1878).

In such circumstances, the district court had no choice but to strike the amendment. It lacked power to permit the amendment, had an application been made to it: *Kelly v. Delaware River Joint Commission*, 3 Cir., 1951, 187 F.2d 93; *Butcher & Sherrerd v. Welsh*, 3 Cir., 1953, 206 F.2d 259; *Ginsburg v. Stern*, 3 Cir., 1957, 242 F.2d 379; *Carpenter v. Rohm & Haas Co., Inc.*, 3 Cir., 1950, 180 F.2d 749. These decisions do not conflict with the decisions of other circuits in any respect material to this petition and conform to the pronouncements of this Court. Even meritorious matter may be stricken from a pleading unless presented in an appropriate manner and at the proper time to a tribunal having the right to pass upon it: *Harrison v. St. Louis and San Francisco Railroad Company*, 232 U. S. 318, 333 (1913).

The judgment of the court of appeals which petitioners ask this Court to review, is not in conflict with any decision of this Court and does not involve any important question of federal law. It is consistent with the decisions of other courts, both state and federal,

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[3] Plaintiffs had argued their "trust" theory to the court of appeals in unsuccessful motions for rehearing (denied May 16, 1958) and for reconsideration (denied June 9, 1958).

which have passed upon the substantive and procedural problems involved. The only departure from the accepted and usual course of judicial proceedings in this case has been by the petitioners.

Certiorari should be denied.

Respectfully submitted,

CARL E. GLOCK
GILBERT J. HELWIG
REED, SMITH, SHAW & MCCLAY
Counsel for Respondent

APPENDIX.

12777

ADA J. VANT and WALTER J. VANT, Appellants

vs.

THE MUTUAL BENEFIT LIFE INSURANCE COMPANY, a corporation

ARGUED:

(Motion by appellee to dismiss appeal and/or in the alternative, to assess costs and attorneys' fees)

Gilbert J. Helwig, Esq., opens in support of motion. (States in answer to Chief Judge Biggs inquiry that costs are $500 and that he seeks both dismissal and costs)

Paul Ginsburg, Esq., opens in opposition to appellee's motion and in support of appellants' motion to remand with directions to grant plaintiffs' motion for summary judgment.

Chief Judge Biggs asks counsel whether they would be willing to treat this argument as one on the merits of the appeal as well as on the motions. Mr. Helwig says yes. Mr. Ginsburg says he will stipulate provided the court will consider the briefs in the prior appeal. Chief Judge Biggs will not accept the stipulation subject to conditions. Mr. Ginsburg says he will stipulate without qualification in the interests of expedition that the appeal may be determined on the merits.

c.a.v.

Order of May 16, 1958, Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,408

ADA J. VANT and WALTER J. VANT,
Appellants,
v.
THE MUTUL BENEFIT LIFE INSURANCE COMPANY, a corporation.

SUR PETITION FOR REHEARING

Present: KALODNER, STALEY and HASTIE, Circuit Judges

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By the Court

WILLIAM H. HASTIE
Circuit Judge

Dated: May 16, 1958

Order of June 9, 1958, Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12408

ADA J. VANT and WALTER J. VANT,
Appellants,
v.
THE MUTUAL BENEFIT LIFE INSURANCE COMPANY, a corporation

Present: KALODNER, STALEY and HASTIE, Circuit Judges

Upon consideration of appellants' motion for leave to file a supplemental appendix and motion for reconsideration of the above entitled appeal in the light of the supplemental appendix, and of the appellee's answer, and of the appellants' reply to appellee's answer.

It is ORDERED that leave to file the supplemental appendix and the motion for reconsideration be and it is hereby granted;

It is Further ORDERED, after full consideration of the supplemental appendix and the motion for reconsideration and the reply to the answer, that the motion for reconsideration be and it is hereby denied.

By the Court,

WILLIAM H. HASTIE
Circuit Judge

June 9, 1958